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IN THE SUPREME COURT

OF THE UNITED STATES

1241

_____ TERM, 1966

MARGARET C. MORRISON — Petitioner

vs.

UNITED STATES OF AMERICA — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Statutes:

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Technical Amendments Act of 1958, P.L. 85-866, 76 Stat. 1609, Sec. 49	5

IN THE SUPREME COURT OF THE UNITED STATES

____TERM, 1966

NO. _____

Margaret C. Morrison *Petitioner*

v.

United States of America *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUT

The petitioner, Margaret C. Morrison, by her attorney prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on January 25, 1966.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Tennessee, Southern Division, is reported at 230 F. Supp. 989, and a copy of same is included in the

certified record. (R.7a). The opinion of the Court of Appeals for the Sixth Circuit is reported at ____ F. 2d ____ and a copy of same is also made a part of the certified record.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on January 25, 1966. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether an otherwise qualifying casualty loss is subject to the provisions of Section 1231 of the Internal Revenue Code of 1954, even though it is wholly uncompensated for by insurance and admittedly deductible in full as an ordinary loss under Section 165 (c) if not covered by Section 1231.

The District Court answered "No" to this question. The Court of Appeals, in reversing and remanding this case, in effect answered this question "Yes".

STATUTES INVOLVED

The pertinent portions of Sections 165 and 1231 of the Internal Revenue Code of 1954 are set forth in the Appendix.

STATEMENT

This suit was commenced as a suit for the recovery of federal income taxes under the provisions of Title 28, U S C Section 1346 (a). The basic undisputed facts are: In 1960 your petitioner herein sustained a loss to her personal residence, resulting from damage caused by an ice storm to trees, shrubbery and other improvements upon the premises. The amount of the undisputed loss was Five Thousand Dollars ($5,000 00), none of which was compensated for by insurance or otherwise in any amount. In the same year your petitioner realized a gain in the amount of Eighteen Thousand Nine Hundred Thirteen Dollars and Forty Cents ($18,913.40) upon the sale of an orange grove which had been held by your petitioner for income producing purposes On the federal income tax return for 1960. your petitioner treated the loss from the storm damage as a casualty loss and and deducted it as an ordinary loss under the provisions of Section 165(c) (3) of the Code. Your petitioner treated the gain from the sale of the orange grove as a gain from the sale of a capital asset under the provisions of Section 1231 (a) of the Code.

The government took the position that the casualty loss was an involuntary conversion of a capital asset held for more than six months which was converted into other property or money and, as such, had to be netted against the gain from the sale of the orange grove in accordance with Section 1231 (a). Your petitioner contended, and still contends, that the casualty loss is deductible as an ordinary loss under Section 165 (c) (3) of the Code.

On the suit for refund, the District Court agreed with your Petitioner and held:

> "Even when dealt with in isolation from any other section, a rather involved process of rationalization and a series of inferences must be drawn to conclude that Section 1231 treats an uninsured casualty loss to residential property as a 'comp ulsory and involuntary conversion' of a capital asset. When viewed in context with Section 165, this Court is of the opinion that the latter section would con trol the deductibility of an uninsured casualty loss to residential property. The reasoning of the Appellate Court in the *Maurer v United Statcs* case, *supra*, appears the more compelling and cogent to this Court."

The Court of Appeals for the Sixth Circuit dis agreed with the District Court and held that the loss in question is subject to the provisions of Section 1231 (a) of the Code.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Maurer v. United States*, 284 F. 2d 122, (C.A. 10, 1960). In addition, review is appropriate because of the far reaching effect this decision will have on the large number of other taxpayers. The type

of loss involved herein is not an unusual tax loss but one that is sustained by taxpayers nearly every day of the year As a result of the two conflicting Court of Appeals decisions many taxpayers are now faced with the problem of whether to deduct the loss as an ordinary loss under 165 (c) (3) of the Code and bear the cost of appealing from an adverse decision of the government or netting the loss against their 1231 gains and thereby overpay their taxes in the event this Court ultimately rules for the taxpayer s position in this matter

There is no question but that the two Court of Appeals decisions are in conflict. The Court of Appeals for the Sixth Circuit recognized this fact and made the following appropriate comment

> We realize that the question presented on this appeal is a close one and while we have great respect for the opinion of the Tenth Circuit, we believe that the view we take is the more logical one and that it conforms to the intent of Congress in enacting the legislation.

The government may well contend that there is no conflict because the taxable year involved in the *Maurer* case, *supra*, was prior to the passage of the Technical Amendments Act of 1958, P L 85–866, 72 Stat. 1606, Section 49 (a). However such an argument is completely without merit since the Act in question did not change the substantive meaning of Section 1231 (a) but simply excluded from its coverage uninsured losses arising from the destruction, etc.,

of (1) property used in a trade or business or (2) a capital held for more than six months and held for the production of income. Thus, no change was made which might in any way effect the applicability of Section 1231 (a) to the type of loss involved in the instant case. Moreover, the opinion in the *Maurer* case was not rendered until 1960 which was some time after the passage of the Technical Amendments Act of 1958. As a result the Tenth Circuit was well aware of the Amendments. Of course the Government knows this is true since it relied heavily on the Amendments in its brief in the *Maurer* case.

In addition to the conflicting decisions mentioned above this case should be reviewed because it is erroneous and therefore will have an adverse effect on an extremely large number of taxpayers in similar situations. As stated previously the tax situation involved herein is very common. Your petitioner contends the decision is erroneous because Section 1231 (a) is clearly aimed at involuntary conversions of capital assets held for more than six months where *other property of money* is received in return.

Upon close examination of the wording of Section 1231 (a) it can be seen that the wording:

> "If during a taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used

> in the trade or business *and capital assets held for more than 6 months into other property or money* ** "(*Emphasis supplied*)

indicates an intention to include gains and losses from the sale and involuntary conversion of (1) property used in a trade or business and (2) capital assets held for more than 6 months and which are converted into other property or money. Consequently, if such capital asset is not converted into other property or money, the provisions of Section 1231 (a) are not applicable. Such rationale clearly is indicated

While it may be possible for Sections 165 and 1231 (a) to overlap, Congress clearly pre empted Section 165 (c) in instances where the casualty loss was uninsured, since only through such means could the property of your petitioner have been converted into other property or money.

However, the overlapping effect of Sections 165 (c) and 1231 (a) are not to follow as a natural consequence. This is especially true when examining the sequence of sec tions of the Internal Revenue Code. Section 165 (c) is a part of a Code section which is headed "Losses". But there are nine different subsections of this master section defining losses which are deductible. One of these subsections is 165 (f) which reads:

> "Capital Losses. Losses from sales or ex changes of capital assets shall be allowed only to the extent allowed in Sections 1211 and 1212."

Thus, the question arises, are casualty losses of a capital asset deductible under Section 165 (c) or 165 (f)? The obvious answer lies in the wording of Section 165 (c) which unequi vocally permits the deduction of losses of property not connected with a trade or business if such losses arise from

fire, storm, shipwreck or other casualty **." Consequently, your petitioner contends that Section 165 (c) causes losses of this peculiar nature to become ordinary losses, which by definition do not arise from capital assets. If such property is not a capital asset, then clearly Section 1231 (a) is not applicable.

As stated by the trial court in its opinion

> "It appears to the Court that the fallacy in the position of the government is that it seeks to deal with and interpret Section 1231 in isolation from all other sections of the Internal Revenue Code. The government in its brief totally disregards Section 165 and treats Section 1231 as if it were the only pertinent section to the issue in this lawsuit. As stated in the *Maurer* case:
>
> "Section 165, and its predecessor 23 (e), have traditionally been the means for deducting uncompensated casualty losses from income where, as here, the property is non income producing."

Despite the clear language of the code section, the Sixth Circuit relied on so-called legislative history to conclude that the loss in question should be netted against 1231 (a) gains. Your petitioner submits that legislative history, while a great aid to courts in determining the intent of Congress, cannot be used to completely change the meaning of a code section. However, this is exactly what the Sixth

Circuit did in the instant case. Proof of this can be easily established by studying the provisions of Section 1231 (a) and 165 (c) (3) without the aid of any committee reports. By using this approach it is impossible to reach the decision arrived at by the Court of Appeals for the Sixth Circuit. Your petitioner contends that if the Congress wants all uncompensated losses to be covered by Section 1231 (a) then the code section should be amended to so provide. In the meantime the code section should be limited to the type of gains and losses specifically described therein.

In this regard, and as pointed out previously, the District Court, in deciding this case favorably to your petitioner, made a very apt observation:

> "Even when dealt with in isolation from any other section, a rather involved process of rationalization and a series of inferences must be drawn to conclude that Section 1231 treats an uninsured casualty loss to residential property as a 'compulsory and involuntary conversion' of a capital asset."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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